

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD M. BARRON,

Plaintiff-Appellee/Cross-Appellant,

v

IDA B. BARRON,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

October 19, 2001

No. 220841

Genesee Circuit Court

LC No. 97-184807-DM

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Defendant appeals as of right and plaintiff cross-appeals the trial court's judgment of divorce. We affirm in part and reverse in part.

Both parties challenge the trial court's property division. Generally, a trial court's factual findings are to be upheld unless they are clearly erroneous. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996), quoting *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). The trial court's goal in apportioning a marital estate "is to reach an equitable division in light of all the circumstances." *Welling v Welling*, 233 Mich App 708, 710; 592 NW2d 822 (1999). The trial court's dispositional ruling is discretionary and will be affirmed unless we are left with the firm conviction that the division was inequitable. *McDougal*, *supra* at 87, quoting *Sands*, *supra* at 34.

Defendant argues that the trial court should not have deemed a valuable investment account to be plaintiff's separate property. The trial court's "first consideration when dividing property in divorce proceedings is the determination of marital and separate assets." *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). Our Supreme Court has recognized that "property received by a married party as an inheritance, but kept separate from marital property, is deemed to be separate property not subject to distribution." *Dart v Dart*, 460 Mich 573, 585; 597 NW2d 82 (1999). As noted above, the trial court concluded that the investment account was plaintiff's separate property. In support of this conclusion, the trial court found that the investment account was financed solely by plaintiff's inheritance received *before* the parties' marriage, and that the account grew by "passive appreciation." There was testimony that there were significant withdrawals from the account to pay for various expenses. Although the trial court noted that there were deposits to the account during the marriage, the trial court found that these deposits essentially canceled out the withdrawals because the investment account's value

was less than what would be expected with nominal appreciation. Finally, the trial court found that defendant did not directly or indirectly contribute to the appreciation of the investment account. In light of these findings, we do not believe that the trial court clearly erred by ruling that the investment account was plaintiff's separate property.

Plaintiff raises several challenges to the trial court's property division, as well. For example, plaintiff contends that the trial court erroneously valued the marital home at \$155,000. There was evidence that the mortgage lien was approximately \$113,000, and the trial court found the equity to be \$42,000. Although there was some evidence that the marital home's value was higher, plaintiff's trial brief indicated a value of \$156,000 and defendant's trial brief indicated a value of \$155,000. Defendant also testified that homes in the neighborhood were not selling. Accordingly, we do not believe that the trial court clearly erred by valuing the home at \$155,000.

Plaintiff also contends that the trial court erred by awarding defendant a disproportionate share of the marital estate. As noted above, a trial court is not required to divide the estate into mathematically equal parts, but is required to divide the estate equitably. *Welling, supra* at 710. Here, the trial court noted that the parties had very different earning abilities, and that plaintiff was at the height of his career, had a large amount of separate property, and would be well provided for in his retirement. Thus, we believe that the trial court's decision to award defendant a larger share of the marital estate was fair and equitable under the circumstances.

Plaintiff also contends that the trial court erred by invading his separate assets to pay off the mortgage on the marital home. A spouse's separate estate maybe invaded when the court determines that there is a need to do so. *Reeves, supra* at 494.; MCL 552.23. Here, the trial court opined that the disparity in the earning capacity of the parties justified the "modest" invasion of plaintiff's separate assets. The trial court recognized defendant's desire to keep the marital home, if possible, and invasion of plaintiff's separate assets was necessary to implement that goal. Based on the significant difference in earning capacity, as well as the substantial difference in total assets that the parties left the marriage with, we are not persuaded that the trial court erred by invading plaintiff's separate assets.

Next, plaintiff argues that the trial court awarded defendant excessive alimony. The primary objective of alimony "is to balance the incomes and needs of the parties in a way that will not impoverish either party." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "Relevant factors for the court to consider include the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case." *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). We review a trial court's factual findings regarding an award of alimony for clear error. *Moore, supra* at 654. If the factual findings are not clearly erroneous, we then decide whether the dispositional ruling was fair and equitable in light of those facts. *Id.*

Again, we note that the trial court correctly recognized the income disparity between the parties. Moreover, defendant received assets from the property disposition that lacked liquidity. In addition, the parties had been married a substantial period of time. Although the alimony award was substantial, there is no indication that it will impoverish plaintiff. Indeed, notwithstanding defendant's larger share of the marital estate, plaintiff still left the marriage with more assets because the trial court concluded that the aforementioned investment account was

his separate asset. In light of these facts, we conclude that the trial court's alimony award was fair and equitable under the circumstances.

Finally, plaintiff argues that the trial court improperly awarded defendant attorney fees. Here, the trial court ordered plaintiff to pay \$5,000 toward defendant's attorney fees, noting that the "matter was skillfully and succinctly tried by both counsel" The trial court noted that its award was modest in light of defendant's "other assets."

A trial court's decision to award attorney fees is reviewed for an abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). The party requesting attorney fees and expenses must "allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay." MCR 3.206(C)(2); See *Kosch*, *supra* at 354. In the instant matter, although plaintiff argued against having to pay attorney fees in his trial brief, defendant did not request attorney fees in her trial brief. Defendant did not request attorney fees during the trial, nor was any specific evidence presented with respect to her need for attorney fees or defendant's ability to pay. Finally, we note that there was no evidence presented concerning the amount of attorney fees incurred by defendant. Thus, while we do not take issue with the trial court's assessment of defense counsel's performance, we find no support in the record for an award of \$5,000 in attorney fees. Consequently, we reverse the trial court's order of \$5,000 in attorney fees.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ Donald S. Owens